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No. 08-409

In the Supreme Court of the United States

WALTER RALPH MABRY AND ANTHONY MICHAEL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "settlement exception" of 29 U.S.C. 186(c)(2), which provides an affirmative defense to a charge that a union official received payment from an employer in violation of 29 U.S.C. 186(b)(1), requires the defendant to show some level of structure or formality in the settlement to ensure its legitimacy.

2. Whether by rejecting petitioners' interpretation of the "settlement exception" the court of appeals directed a verdict for the government in violation of the Sixth Amendment right to a jury trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 518 F.3d 442. The opinion of the district court (Pet. App. 23a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2008. A petition for rehearing was denied on June 30, 2008 (Pet. App. 21a-22a). The petition for a writ of certiorari was filed on September 26, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioners

were convicted of conspiring to violate the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 186, in violation of 18 U.S.C. 371; and receiving an unlawful payment from an employer while serving as an officer of a labor organization, in violation of 29 U.S.C. 186(a), (b)(1) and (d)(2). Petitioner Mabry was sentenced to 24 months of imprisonment, to be followed by three years of supervised release, and fined $50,000. Petitioner Michael was sentenced to 12 months and one day of imprisonment, to be followed by two years of supervised release, and fined $3000. Pet App. 3a-4a.

1. Petitioners were officers of the Michigan Regional Council of Carpenters (MRCC), a labor organization. Mabry was the executive secretary-treasurer, and Michael, who reported directly to Mabry, was the president and executive director. In 1997, Mabry decided to build a new house. Between January 1998 and December 1998, five carpentry contractors whose employees were represented by MRCC performed construction work on Mabry's house. Mabry received from the contractors over $120,000 worth of discounts below the prevailing market rate on building materials, labor, and related costs. Pet. App. 2a & n.1, 10a; Gov't C.A. Br. 3-22, 55.

One of the contractors was Nelson Mill Company (Nelson Mill), the owner of which had previously negotiated collective bargaining contracts with petitioners when they were representing the MRCC. Although Nelson Mill ordinarily performed finish carpentry and custom millwork only on commercial buildings, it completed the interior trim work on Mabry's house between August and December 1998. In March 1999, Nelson Mill submitted an invoice for $46,117, which covered the cost of labor, materials, and direct overhead but did not in-

clude indirect overhead costs or a profit. Pet. App. 2a-3a; Gov't C.A. Br. 14-18 & n.8.

Petitioners complained to Nelson Mill about the invoiced amount and asked for a reduction. In September 1999, Nelson Mill resubmitted the same invoice with a computer printout detailing the costs, but petitioners again complained and did not pay. On November 30, 1999, Nelson Mill submitted a revised invoice for $26,000, an amount significantly less than the actual costs of the job. In December 1999, Mabry paid that invoice. By accepting the lower amount, Nelson Mill suffered a substantial loss. Pet. App. 3a; Gov't C.A. Br. 19-22.

2. On November 29, 2004, a grand jury sitting in the Eastern District of Michigan returned a two-count indictment charging petitioners with conspiring to violate the LMRA in violation of 18 U.S.C. 371; and receiving an unlawful payment from an employer while serving as an officer of a labor organization, in violation of the LMRA, 29 U.S.C. 186(a), (b)(1) and (d)(2). The conspiracy count was based on petitioners' transactions with all of the contractors on Mabry's house, and the substantive count was based on petitioners' receipt of below-cost construction work from Nelson Mill.[1] Pet. App. 3a.

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[1] Because the indictment was returned on November 29, 2004, only transactions occurring after November 29, 1999, fell within the five-year statute of limitations in 18 U.S.C. 3282(a). The Nelson Mill transaction satisfied that requirement because Nelson Mill submitted the reduced invoice on November 30, 1999, and petitioners paid it in December 1999. Gov't C.A. Br. 21-22; Pet. App. 3a. The conspiracy count fell within the statute of limitations because the Nelson Mill transaction was alleged as an overt act in furtherance. See *Dennis* v. *United States*, 384 U.S. 855, 864 n.8 (1966); *Grunewald* v. *United States*, 353 U.S. 391, 396-397 (1957).

Shortly before trial, petitioners moved to dismiss the indictment and to sever the substantive count on the ground that the conduct it alleged was protected by the "settlement exception" of 29 U.S.C. 186(c)(2), which excludes payments made to settle certain disputes from the statutory prohibition on payments between employers and union officials. Pet. App. 3a; Gov't C.A. Br. 25 & n.15. At a hearing, the district court denied the motions but ruled that Section 186(c)(2) provides an affirmative defense applicable to the settlement of any dispute, even an informal one that had never been the subject of arbitration or litigation. 9/26/05 Tr. 23-24, 36; see Pet. App. 23a.

On reconsideration, the district court reversed its ruling. Pet. App. 23a-36a. The court held that "Section 186(c)(2) applies only if the parties have reached a resolution of a dispute or claim through the adjudicative process, meaning a judgment of a court or an arbitrator's award." *Id.* at 36a. The court thus concluded that "Section 186(c)(2) offers no protective refuge for any parties that resolve a dispute through independent, informal negotiations held solely between the parties themselves." *Ibid.*

Following a trial, the jury convicted petitioners on both counts. The district court denied petitioners' motions for judgments of acquittal. Pet. App. 4a.

3. The court of appeals affirmed. Pet. App. 1a-20a. It rejected petitioners' argument that the informal resolution of the Nelson Mill payment dispute qualified for protection under Section 186(c)(2). *Id.* at 4a-8a.

The court of appeals observed that "[o]ne of the purposes of enacting § 186 was to combat the corruption of the collective bargaining process that occurs when a union employer gives something of value to a union rep-

resentative." Pet. App. 6a. "This purpose would be undermined," the court explained, "if employers and union officials could simply enter into informal agreements, later dispute these agreements, and then make payments in 'settlement' of the dispute." *Ibid.* The court also observed that the other eight exceptions in 29 U.S.C. 186(c) "refer to situations where the way in which the payment is made evidences its legitimacy under [the LMRA]." Pet. App. 6a. Based on "the underlying purpose of § 186 and the statutory scheme of the exceptions," the court "infer[red] that Congress similarly intended that there should be some external evidence of the legitimacy of the payment for the payment to qualify under [the "settlement exception" of] § 186(c)(2)." *Id.* at 7a.

The court drew the same conclusion from the text of Section 186(c)(2). That provision, the court noted, "legalizes three types of payments * * * made to resolve some type of dispute: (1) payments made in satisfaction of the outcome of litigation, (2) payments in satisfaction of the outcome of arbitration, and (3) payments to otherwise resolve a dispute, in the absence of fraud or duress." Pet. App. 7a. The court observed that "[t]he first two categories are specific, referring to structured methods of dispute resolution," while the third category is "more general, serving as a statutory catch-all to encompass payments resulting from less structured means of dispute resolution." *Ibid.* Applying the canon of *ejusdem generis*, the court concluded that "the third category must be constrained by the specificity of the preceding ones, meaning that the third category must be interpreted to require some level of structure or formality in resolving a dispute to evidence the legitimacy of the ensuing payment." *Id.* at 8a. The court declined to

delineate "what degree of structure must be present to trigger the protection of § 186(c)(2)," deeming it "certain that [the requisite structure was] lacking" in the payment to Nelson Mill. *Ibid.*

Judge Keith dissented in relevant part. Pet. App. 14a-20a. He disagreed "with the majority's determination that in order for the 'settlement exception' * * * to apply, the parties must have initiated a structured dispute resolution process." *Id.* at 14a. In his view, "the appropriate interpretation of § 186(c)(2) is that informal settlements of informal disputes are excepted from the general prohibition of § 186 so long as such settlements are made in the absence of fraud or duress." *Id.* at 19a-20a.

ARGUMENT

1. Petitioners contend (Pet. 9-19) that the settlement exception in 29 U.S.C. 186(c)(2) broadly exempts from criminal liability any payment from an employer to a union official to resolve an informal dispute as long as the payment is made in the absence of fraud or duress. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

a. Section 186(b) makes it "unlawful for any person to * * * receive * * * any payment * * * prohibited by" Section 186(a). 29 U.S.C. 186(b)(1). As relevant here, Section 186(a) makes it "unlawful for any employer * * * to pay * * * any money or other thing of value * * * to any labor organization, or any officer or employee thereof, which represents * * * any of the employees of such employer who are employed in an industry affecting commerce." 29 U.S.C. 186(a)(2). Section

186(a) thus prohibits employers from paying anything of value to employees' representatives or union officials, and Section 186(b), in turn, prohibits those officials from receiving such payments.

Section 186(c) provides nine exceptions to those prohibitions. The "settlement exception" in Section 186(c)(2) states that Sections 186(a) and (b) do not apply

> with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress.

29 U.S.C. 186(c)(2).

b. The court of appeals correctly rejected petitioners' contention (Pet. 10) that any payment an employer makes to a union official is protected under Section 186(c)(2) as long as it is characterized as the settlement of an informal dispute and does not involve fraud or duress.

In the government's view, payment by an employer to a union official falls within the "settlement exception" of Section 186(c)(2) only when the payment represents the settlement of an actual controversy presented to a court, arbitrator, or other impartial adjudicator. As the government argued below (Gov't C.A. Br. 29-30), that view is supported by the text of Section 186(c)(2) as well as by its legislative history. During Congressional hearings, Senator Ball, one of the sponsors of the floor amendment that became Section 186, stated that, to qualify for protection under Section 186(c)(2), a payment must be made "in satisfaction of a judgment rendered by

a court, or in compromise of litigation," thus implying that the payment must settle a case or controversy already presented for adjudication. See 93 Cong. Rec. 4678 (1947).

The purpose of the criminal prohibitions in Section 186 supports that interpretation of the "settlement exception." Section 186 "is, in part, a conflict-of-interest statute designed to eliminate practices that have the potential for corrupting the labor movement." *United States* v. *Phillips*, 19 F.3d 1565, 1574 (11th Cir. 1994), cert. denied, 514 U.S. 1003 (1995); see *Toth* v. *USX Corp.*, 883 F.2d 1297, 1300 (7th Cir.) ("It is fairly universally acknowledged that a central purpose of [Section 186] as a whole [is] to prevent employers from bribing union officials."), cert. denied, 493 U.S. 994 (1989). In *Arroyo* v. *United States*, 359 U.S. 419 (1959), this Court noted that Section 186 "was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process," such as "bribery of employee representatives by employers" and "extortion by employee representatives." *Id.* at 425-426. Petitioners' broad reading of Section 186(c)(2) would substantially frustrate those objectives. As the court explained, allowing such informal settlements to qualify under Section 186(c)(2) "would nullify 'the proscriptive effect of the statute . . . since every payment by an employer to a union could be characterized as a settlement of a claim or demand made by the union.'" Pet. App. 6a (quoting *International Longshoremen's Ass'n* v. *Seatrain Lines, Inc.*, 326 F.2d 916, 920 (2d Cir. 1964)).

The court of appeals took a different route to that conclusion. While declining to adopt the government's view, Pet. App. 5a, the court correctly held that "'settlement' [in Section 186(c)(2)] cannot be construed so

broadly as to include the informal resolution of the Nelson Mill payment dispute." *Id.* at 5a-6a. As the court of appeals recognized, the proper interpretation of a statute takes into account "'not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'" *Holloway* v. *United States*, 526 U.S. 1, 6 (1999) (quoting *Bailey* v. *United States*, 516 U.S. 137, 145 (1995)). The court of appeals correctly reasoned that the first two categories of payments allowed under Section 186(c)(2) refer to "structured methods of dispute resolution," Pet. App. 7a, and that, consistent with the canon of *ejusdem generis*, the third category should be interpreted also to require "some level of structure or formality in resolving a dispute to evidence the legitimacy of the ensuing payment." *Id.* at 8a. See *James* v. *United States*, 550 U.S. 192, 199 (2007) ("[W]hen a general phrase follows a list of specifics, it should be read to include only things of the same type as those specifically enumerated."); *Brogan* v. *United States*, 522 U.S. 398, 403 n.2 (1998) ("Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration.") (quoting *Norfolk & W. Ry.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991)).

Both the government's and the court's readings of the statute are narrower than petitioners' view, which would extend the protection of Section 186(c)(2) to any payment an employer makes to a union official in settlement of any informal dispute provided the payment is unaccompanied by fraud or duress. Because petitioners could not prevail under either the government's or the court of appeals' interpretation, this case does not

squarely implicate the question of which of those approaches is correct.

2. a. There is no disagreement among the courts of appeals on the meaning of Section 186(c)(2), and petitioners do not assert such a conflict. Petitioners argue (Pet. 10-12, 15-16), however, that the court of appeals' decision is inconsistent with guidance published by the Department of Labor concerning the reporting requirements in 29 U.S.C. 432 and 433. Section 432(a)(6) requires an officer of a labor organization to report "any payment of money or other thing of value * * * which he or his spouse or minor child received directly or indirectly from any employer * * *, except any payments of the kind referred to in section 186(c) of this title." 29 U.S.C. 432(a)(6). Section 433(a)(1)(B) requires an employer to report "any payment or loan, direct or indirect, of money or other thing of value * * * to any labor organization or officer * * *, except * * * payments of the kind referred to in section 186(c) of this title[.]" 29 U.S.C. 433(a)(1)(B). On a website addressing "Frequently Asked Questions" about the reporting requirements, the Department of Labor lists payments "in satisfaction of a judgment or arbitration award," as well as payments "to settle a bona fide claim, in the absence of fraud or duress," as examples of transactions that an employer need not report. Employment Standards Admin., U.S. Dep't of Labor, *Form LM-10, Employer Reports Frequently Asked Questions* (last modified Oct. 26, 2007) (*Form LM-10 FAQs*) <http://www.dol.gov/esa/olms/regs/compliance/LM10_FAQ.htm> (Answer No. 19).

Contrary to petitioner's contention, the decision below is not necessarily inconsistent with the Department of Labor's guidance. That guidance does not detail what

constitutes "a bona fide claim" or address whether, as the court of appeals concluded, Section 186(c)(2) requires that the transaction contain some level of formality or structure. More importantly, the Department of Labor is not the agency charged with administering Section 186. See *Department of Labor Jurisdiction to Investigate Certain Criminal Matters*, 10 Op. Off. Legal Counsel 130 (1986). The Department of Labor explicitly cautions on its website, moreover, that the guidance offered there "is intended as compliance assistance[,] * * * is not legal advice, and should not be relied upon as legal advice." *Form LM-10 FAQs*. Of particular importance, the guidance also states that it "does not interpret the provisions of section [186(c)], and conclusions reached by the Department [of Labor] regarding payments of the kind referred to in section [186(c)] would not bind the Department of Justice in carrying out its criminal enforcement responsibilities." *Ibid.* (Answer No. 87). Thus, even if there were a conflict between the decision below and the guidance on the Department of Labor website, that conflict would not warrant this Court's review.

This case would not provide a suitable vehicle for review of that purported conflict, moreover, because petitioners' "claim" against Nelson Mill was not "bona fide," and petitioners therefore could not prevail even under a generous reading of the Department of Labor guidance. The original sum that Nelson Mill billed petitioners for the work performed on Mabry's house did not include indirect overhead costs or a profit. See Pet. App. 3a. If petitioners had simply paid that invoice rather than disputing it, they would have received a thing of value from Nelson Mill in violation of Section 186(b)(1) because Nelson Mill typically charged other customers a significant

mark-up on its labor and materials. See Gov't C.A. Br. 15-16 & n.8; 29 U.S.C. 186(c)(3) (providing exception to criminal liability for "the sale or purchase of an article or commodity at the prevailing market price in the regular course of business"). Petitioners essentially contend that, although they would have committed a crime by accepting that benefit, they should be exempt from criminal liability because they successfully complained about the original invoice and then accepted in "settlement" of that "claim" an even *greater* benefit. This is not a case, therefore, in which an employer and union official disagree informally about an arms-length transaction and the defendant's criminal culpability turns solely on the question whether his receipt of payment in settlement of a "bona fide claim" must be accompanied by sufficient structure or formality to establish its legitimacy.

b. There is no merit to petitioners' contention (Pet. 12-14) that the decision of the court of appeals conflicts with *Watson* v. *United States*, 128 S. Ct. 579 (2007). In that case, which did not involve the LMRA, the Court held that a person who trades drugs to obtain a firearm does not "use" the firearm during and in relation to a drug trafficking crime within the meaning of 18 U.S.C. 924(c)(1)(A). After noting that the statute did not define the term "uses," the Court relied on "the language as we normally speak it," concluding that there was "no other source of a reasonable inference about what Congress understood when writing or what its words will bring to the mind of a careful reader." *Watson*, 128 S.Ct. at 583. The Court rejected the government's argument that failing to treat the receipt of a firearm in exchange for drugs as a "use" of the firearm would create unacceptable symmetry with *Smith* v. *United States*, 508 U.S. 223 (1993), which held that trading a firearm to obtain

drugs constituted "use" of the firearm under Section 924(c)(1)(A). *Watson*, 128 S. Ct. at 585-586. The Court reasoned that "policy-driven symmetry cannot turn 'receipt-in-trade' into 'use.'" *Id.* at 585.

Watson is inapposite here. The court of appeals' interpretation of the language of Section 186(c)(2) is consistent with "ordinary meaning and the conventions of English." *Watson*, 128 S. Ct. at 586. The court of appeals, moreover, did not rely on concerns of "policy-driven symmetry" to override the language of the statute but rather interpreted that language in light of statutory purpose and context. Pet. App. 7a. The court's reasoning was consistent not only with *Watson* but also with *Arroyo*, which, in addressing the same section of the LMRA, observed that "'though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature." *Arroyo*, 359 U.S. at 424 (quoting *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)).

Petitioner is also incorrect in asserting (Pet. 16-19) that the decision below conflicts with *United States* v. *Santos*, 128 S. Ct. 2020, 2024-2025 (2008). There, this Court held that, under the rule of lenity, the term "proceeds" in the money laundering statute, 18 U.S.C. 1956(a)(1)(A)(i), must be construed to refer to profits, rather than receipts, because that term was ambiguous. The Court explained that the "rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *Santos*, 128 S. Ct. at 2025 (plurality opinion); *id.* at 2033-2034 (Stevens, J., concurring in the judgment).

Like *Watson*, *Santos* has no bearing on this case. The court of appeals did not find that Section 186(c)(2) was ambiguous. Rather, the court indicated that any

potential ambiguity in that provision was resolved by interpreting the "settlement exception" in a manner consistent with the other exceptions in Section 186(c). See Pet. App. 6a. In any event, the rule of lenity applies only where there is a "grievous ambiguity or uncertainty in the statute" such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted). Because the court of appeals correctly concluded that the language of the "settlement exception" was not ambiguous when viewed in light of the motivating polices of the statute and the context of Section 186(c), the rule of lenity is inapplicable here.

3. Petitioners contend (Pet. 20-23) that the court of appeals' affirmance of their convictions effectively constituted a directed verdict for the government in violation of the Sixth Amendment right to a jury trial. That contention lacks merit and does not warrant further review.

This Court has explained that "[w]hat the factfinder must determine to return a verdict of guilty [in a criminal case] is prescribed by the Due Process Clause" of the Fifth Amendment. *Sullivan* v. *Louisiana*, 508 U.S. 275, 277 (1993).[2] The Due Process Clause requires only that the government prove beyond a reasonable doubt all of the elements necessary to constitute the crime with which the defendant is charged. *Martin* v. *Ohio*, 480 U.S. 228, 231-232 (1987). Where Congress expressly

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[2] The Court deemed it "self-evident" in *Sullivan* that "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." 508 U.S. at 278.

enacts an affirmative defense to a crime, the "'settled rule'" imposes on the defendant the burden of proving that it applies. *Dixon* v. *United States*, 548 U.S. 1, 13 (2006) (quoting *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922)); *Patterson* v. *New York*, 432 U.S. 197, 210 (1977) ("Proof of the non-existence of all affirmative defenses has never been constitutionally required.").

Petitioners concede that the "settlement exception" in Section 186(c)(2) is an affirmative defense to criminal liability under the statute. See Pet. 21-22. Petitioners therefore bore the burden of proving the defense. The court of appeals simply rejected petitioners' interpretation of Section 186(c)(2) and concluded as a matter of law that petitioners had failed to meet the showing that the provision requires. The court did not engage in any "additional fact-finding steps" regarding an element of the offense, Pet. 22, and therefore did not in any sense direct a verdict for the government.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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